Supreme Court, U. S.
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No. 80-260

Supreme Court of the United States

OCTOBER TERM 1980

PHILIP MILESTONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the indictment against petitioner was unconstitutionally amended, after the grand jury had charged an offense under 18 U.S.C. §201(b)(1) by a single payment of money with alleged intent to influence both of two independent and unrelated income tax proceedings, each within a separate Internal Revenue Service Division and each in the hands of a different IRS employee, when the trial court amended the indictment and eliminated the allegation that the payment had been made with intent to influence the agent in charge of that proceeding.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding in this Court.

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Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit below is not yet reported. A copy of that court's opinion is attached as Appendix A. The opinion of the District Court below was delivered orally and is attached as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit below was filed on June 30, 1980 (Appen-

dix B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

STATEMENT OF THE CASE

This post-conviction proceeding, under 28 U.S.C. §2255, challenges the validity of the judgment against petitioner in a criminal prosecution in the United States District Court for the Eastern District of Pennsylvania.

Petitioner was convicted on one count of a four-count indictment. The count upon which petitioner was found guilty is substantially different from the true bill returned by a grand jury.

Count III, as endorsed by the grand jury foreman, alleged that petitioner had corruptly paid $200.00 to Arnold R. Small, an officer in the Internal Revenue Collection Division, with intent to influence Officer Small on a matter regarding collection of delinquent taxes, *and* with intent to influence Robert A. Mastrogiovanni, an Agent in the IRS Audit Division, on a different matter then pending before Agent Mastrogiovanni. Although conjoined by the grand jury in charging an offense, the two IRS proceedings were independent and unrelated to each other. Officer Small's task was to collect unpaid taxes on petitioner's 1971 and 1972 income. Agent Mastrogiovanni's duty was to investigate petitioner's tax returns for 1974 and 1975.

The third count of the indictment was as follows:

THE GRAND JURY FURTHER CHARGES:

That on or about November 16, 1977, at Philadelphia, in the Eastern District of Pennsylvania, PHILIP MILESTONE corruptly did, directly and indirectly, give a thing of value, that is, money in the amount of approximately two hundred dollars ($200.00) to Arnold R. Small, an officer and employee of the United States Department of the Treasury, to wit: a Revenue Officer of the Internal Revenue Service, with intent to influence the said Arnold R. Small's decision and action on a question and matter then pending before him in his official capacity in respect to the collection of delinquent taxes owed by PHILIP MILESTONE and Madeline Milestone, his wife, and the reaching of a Part Payment Agreement between the said PHILIP MILESTONE and Madeline Milestone, his wife, and the Internal Revenue Service, and with intent to influence the decision and action of Robert A. Mastrogiovanni in his official capacity and in respect to an Internal Revenue Service audit for the tax liability of PHILIP MILESTONE and Madeline Milestone, his wife, for the calendar years 1974 and 1975.

In violation of Title 18, United States Code, Section 201(b)(1) and 2.

Count III of the indictment thus charged that petitioner had paid money to influence Officer Small's actions in the matter of a tax delinquency for two years and to influence Agent Mastrogiovanni's actions in the matter of an audit of petitioner's tax returns for two other years. To convict under Count III, as formed by the grand jury, the trial jury would have to conclude that the single payment had been made to affect both proceedings. In a pretrial hearing, the District Court so ruled. (Hearing, April 28, 1978, Transcript p. 9).[1]

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[1]See also *id.* at pp. 17-18, transcript lodged in court below.

Three days later, on the first day of the trial, the indictment was amended. All reference to the audit proceedings and the allegation of intent to influence Agent Mastrogiovanni were stricken.

> "In Count III of the indictment, we would ask to delete the last section which begins . . . line 8 from the bottom, starting with "and with intent to influence the decision and action of Robert Mastrogiovanni." (Hearing, May 1, 1978, Transcript pp. 4-5).

Counsel for petitioner acquiesced to the Government's motion. Indeed, he had previously moved to have this count dismissed because of duplicity and surplusage. The District Court ordered that the indictment be amended.

Count III, as amended, read:

THE GRAND JURY FURTHER CHARGES:

That on or about November 16, 1977, at Philadelphia, in the Eastern District of Pennsylvania, PHILIP MILESTONE corruptly did, directly and indirectly, give a thing of value, that is, money in the amount of approximately two hundred dollars ($200.00) to Arnold R. Small, an officer and employee of the United States Department of the Treasury, to wit: a Revenue Officer of the Internal Revenue Service, with intent to influence the said Arnold R. Small's decision and action on a question and matter then pending before him in his official capacity in respect to the collection of delinquent taxes owed by PHILIP MILESTONE and Madeline Milestone, his wife, and the reaching of a Part Payment Agreement between the said PHILIP MILESTONE and Madeline Milestone, his wife, and the Internal Revenue Service.

In violation of Title 18, United States Code, Section 201(b)(1) and 2.

Trial was conducted on the amended indictment, which

contained four counts. Count I and II charged petitioner and a co-defendant with making payments to influence the action of Agent Mastrogiovanni. Count IV charged petitioner and a co-defendant with conspiracy to bribe both Agent Mastrogiovanni and Officer Small. Oveart act number 8 under Count IV recited the same $200.00 payment that is the substance of Count III. The jury found petitioner not guiulty of the charges in Counts I, II and IV. The only guilty verdict was rendered on amended Count III, where all reference to the audit proceedings and Agent Mastrogiovanni had been stricken from the indictment.

The district court sentenced petitioner to imprisonment for a term of two years and to a fine of $10,000.00. On direct appeal, the court of appeals for the third circuit affirmed, *United States v. Milestone,* 591 F.2d 1337, and this Court denied certiorari. 100 Sup. Ct. 47 (Oct. 1, 1979).

The question presented in this §2255 proceeding is different from the matters raised on direct appeal by former counsel for petitioner. The district court (Van Artsdalen, D.J.) held a hearing on petitioner's motion to vacate sentence. At the conclusion of the hearing, the motion was denied. Appendix C *infra.*

The United States Court of Appeals for the Third Circuit (Aldisert, Weis, and Garth, C.JJ.) affirmed in an opinion by Judge Weis. Appendix A *infra.*

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. *The Court of Appeals Below Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of this Court.*

The Constitution of the United States guarantees that persons suspected of serious crimes cannot be placed on

trial unless a grand jury returns an indictment charging them with specified offenses. The Fifth Amendment provides:

> no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

The constitutional impropriety of judicial amendment of a grand jury's indictment was announced by this Court in 1887. *Ex parte Bain,* 121 U.S. 1 (1887). Although approaching a hundred years old, the decision of this Court in *Bain* retains its full vitality. This Court said in 1960, "the *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States,* 361 U.S. 212, 217 (1960). And see *Russell v. United States,* 369 U.S. 749 (1962); *United States v. Norris,* 281 U.S. 619 (1930).

The facts of the *Bain* case are strikingly similar to those in the present case. Bain was charged with bank fraud by making a false statement "with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of the [banking] association." 121 U.S. at 4. The prosecution moved to strike the words "the Comptroller of the Currency and" from the indictment, and the trial court so ordered. The effect was to modify the indictment so that the prosecution would have to prove only an intent to deceive the agent appointed to examine the affairs of the association, rather than carrying a burden of proving intent to deceive that agent and the Comptroller of the Currency.

This Court held that the trial court's amendment violated the Constitution. The Court declared:

> No authority has been cited to us in the American courts which sustains the right of a court to amend any part of the body of an indictment without reassembling the grand jury. . . . [T]he institution [of the grand jury] was adopted in this country, and is continued from

> considerations similar to those which gave to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity.

121 U.S. at 8, 11.

The court of appeals below conceded that the decision in *Bain* appears to be controlling in the present case, but went on to find what it deemed to be distinguishable facts. The Third Circuit declared that the statute under which Bain was prosecuted did not make it an offense to act to deceive the Comptroller of the Currency; in that court's view, the statute proscribed only deception of the Comptroller's agent. Thus, said the third circuit, the allegation with respect to the Comptroller did not state an offense and was surplusage.

There are two responses to the reasoning of the court of appeals. First, the analysis that it made to *explain* this court's decision is the precise analysis *rejected* by this court in *Bain*:

> The learned judge who presided in the Circuit Court at the time the change was made in this indictment, says that the court allowed the words "Comptroller of the Currency and" to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. . . . While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable

> that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the Comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment, who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

121 U.S. at 9-10.

Thus, the first response to the court of appeals decision is that it rests upon the rationale that this Court explicitly reversed in *Bain*.

Even if the court of appeals were correct in its novel interpretation of the statute involved in the *Bain* case, the distinction makes the present case a more severe violation of the Constitution. There can be no doubt that 18 U.S.C. §201(b)(1) would make it a crime to bribe either Revenue Officer Small or Revenue Agent Mastrogiovanni. An indictment limited to either alone would not fall outside the

statute, in the manner that the court of appeals thought the statute in *Bain* did not reach the Comptroller of the Currency. Therefore, the language stricken in the present case cannot be described as immaterial or surplusage. We are left with the same rhetorical questions that this Court put in the *Bain* case: How can it be said that there may not have been more than one of the jurors who found the indictment in the present case, who was satisfied that the payment was made to influence Agent Mastrogiovanni? How can it be said that, with these allegations stricken out that petitioner was tried on an indictment found by the grand jury? The decision of the court of appeals fritters away the protection of the Fifth Amendment and is in the teeth of the controlling decision of this Court.

II. *The Court of Appeals Below Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled By This Court.*

Lower federal courts maintain that the decisions of this Court that involve judicial actions with respect to indictments are inconsistent, leaving the law in a confused state. See, *e.g., United States v. Cirami,* 510 F.2d 69, 72 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *United States v. Edwards,* 465 F.2d 943, 950 (9th Cir. 1972). The principal decisions cited for this purpose are *Ex parte Bain, supra,* on one hand, and *Salinger v. United States,* 272 U.S. 542 (1926), and *Ford v. United States,* 273 U.S. 593 (1927), on the other hand. The Court of Appeals below mired itself in the supposed confusion between two lines of cases that proceed from these decisions. It is timely and proper that this Court again address the issues presented by these cases so that any confusion inadvertently created by them can be eliminated.

Ex parte Bain has been thoroughly discussed in the prior section of this petition. Its relationship to the present case is so clear that there ought not to be any spillover from *Sal*

inger and *Ford.* Since the Court of Appeals was led astray, it is necessary to review those decisions briefly in order to understand why the lower courts have experienced difficulty in following the determinations of this Court.

In *Ford*, the indictment charged defendants with conspiracy to violate the National Prohibition Act, the Tariff Act of 1922, and a treaty between Great Britain and the United States. Defendants contended that the indictment was invalid because of the references to the treaty, since the treaty created no offense against the law of the United States. This court agreed that the treaty could not be the basis of a criminal charge, but held that the reference thereto in the indictment could be treated as surplusage.

> But it is contended that this is to amend the indictment and comes within the inhibition of the principle of *Ex parte Bain,* 121 U.S. 1. That decision condemns the striking out of words from an indictment. The action here complained of is merely a judicial holding that a useless averment is innocuous and may be ignored.

273 U.S. at 602.

The prosecution in *Salinger* was for use of the mail to execute a scheme to defraud. The indictment contained several counts. All related to the same scheme, but each count charged a distinct use of the mail for the purpose of carrying out the scheme. Salinger was convicted on the seventh count and acquitted on the others. The trial court withdrew some charges from jury consideration because they lacked any support in the evidence. This Court held that there had been no violation of the Fifth Amendment.

> The contention that the court, by withdrawing from the jury a part of the charge as without support in the evidence, amended the indictment and thereby prevented it from longer serving as an accusation by a grand jury is on no better plane than the [other arguments]. The indictment was not amended, either actually or in legal effect. It remained just as it was returned by the

> grand jury, and the trial was on the charge preferred in it and not on a modified charge. After the evidence was put in, the accused, believing that part of the charge had no support in the evidence, requested that that part be withdrawn from the jury; and the court acceded to the request when the final instructions were given. The scheme to defraud as set forth in the indictment was manifold in that it comprehended several relatively distinct plans for fleecing intended victims. What the court withdrew from the jury was all of these plans but one. . . . Whether this was right or wrong—as to which we intimate no opinion—it did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." . . . In the case of *Ex parte Bain,* 121 U.S. 1, on which the accused relies, there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury.

272 U.S. at 548-49.

It is apparent from these excerpts that the power of trial courts to deal with indictments could be more clearly stated. This Court should eliminate the possibility that the controlling factor is the form in which the trial court acts. Some language in *Salinger* suggests that a trial court is prohibited from deleting language from an indictment, but may accomplish the same result by instructions to the jury to disregard part of the indictment. Surely this is not a result intended by this Court. Constitutional rights, including the Fifth Amendment right involved in this case, are not subject to manipulation by formal means.

As is plainly apparent from the opinion in *Salinger,* the fraudulent scheme charged by the grand jury was "manifold." It had several *alternate* forms. Where alternative theories of fraud are properly charged by the grand jury, it is not a violation of the Fifth Amendment for the trial

court to eliminate those theories for which the evidence at trial lacks support.

Similarly, if the grand jury includes in the indictment factual allegations that do not state an offense or legal references that do not define a crime, a trial court is not tampering with the indictment when this surplusage is removed.

However, where the grand jury has structured an indictment to couple allegations, not as alternatives but as cumulative factual statements of an offense, a trial court lacks power to amend the indictment by striking one branch of those factual allegations. Equally, the trial court lacks power to accomplish that result by an instruction to the jury at the close of the evidence. The district judge in this case recognized the principle when he declared before trial that the prosecution would have to prove intent to influence *both* IRS employees if the case went forward on the indictment returned by the grand jury. However, the district court and the court of cppeals both failed to recognize the meaning of *Bain* which precludes such truncating of an indictment by deleting material factual averments, included by a grand jury.

The premise of the third circuit below is that any language may be stricken from an indictment, no matter how important the deleted matter may have been to the grand jury, if the remainder contains a legally sufficient allegation of an offense. In the view of that court, this "narrows" the charge against a defendant, thus presumably working to his benefit. What remains is, according to the court's theory, still the act of the grand jury. This view, whatever its merits in other circumstances, is plainly inapposite when the grand jury has framed its indictment by conjoining factual averments. The grand jury charged petitioner with an effort to influence a revenue officer *and* a revenue agent, each dealing with a separate tax matter. It is plainly easier for the government to prove only half of that

charge. Indeed, on three counts, which alleged attempts to influence agent Mastrogiovanni, the petit jury acquitted. What the court of appeals described as "narrowing" of the charge obviously involved a substantial disadvantage to the defendant. When, as here, the altered indictment exposes a defendant to hazards greater than those created by action of a grand jury, the substantive guarantee of the Fifth Amendment is violated.

This Court has not spoken to the issues presented here in many years. The problem is one of frequent recurrence in the lower federal courts. It is a matter of fundamental concern to defendants in criminal cases. The confusion that the Courts of Appeals have perceived in this area should be dealt with promptly.[2]

A subordinate issue should also be given authoritative interpretation by this Court. The court below refers to the

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[2]The confusion expressed by lower federal courts is found in even more virulent form in the Department of Justice, as illustrated by the submissions in the court below. In a post-argument letter to the court, the Government declared:

> Although the Supreme Court stated in *Stirone v. United States,* 361 U.S. 212, 217 (1960), that the strict prohibition against amendments to indictments as set forth in *Ex parte Bain* has never been disapproved, it is difficult, if not impossible, to reconcile *Ford* and *Salinger* with *Ex parte Bain*. . . . The government believes that the proper analysis of the cases following *Ex parte Bain* is that *Bain* has been overruled *sub silentio* by *Ford* and *Salinger*.
>
> Any other conclusion would undermine much if not all of the current law in this and other circuits regarding amendments and variances (lodged in the clerk's office in the court below).

Department of Justice attorneys are responsible to provide legal assistance to grand juries. When those attorneys are as confused as this submission indicates, it is important that this Court intervene promptly to avoid further serious damage to the system of justice.

so-called "liberalizing effect" of the provision for waiver of indictment in Rule 7(b) of the Federal Rules of Criminal Procedure. The Federal Rule makes plain, of course, that only the defendant himself can agree to forego the protection of a grand jury, and then after being advised of his rights in open court. No such waiver occurred in this case. Nonetheless, the courts below seek to find some comfort for their decisions in the failure of *defense counsel* to object to the prosecution's motion to amend the indictment.

Absence of contemporaneous objection by defense counsel is not significant. Even if defense counsel had expressly agreed to the amendment, it would not avail the Government. *United States v. Norris,* 281 U.S. 619 (1930). Improper amendment of an indictment can be presented by motion to vacate sentence under §2255 even though there was no objection at trial. *United States v. Hayes,* 464 F.2d 1252 (5th Cir. 1972). Nothing in the Federal Rules of Criminal Procedure undermines the holding in the *Norris* case.

Indeed, on the main issue presented by this petition, the Rules of Criminal Procedure provide support by analogy in the requirements for amendment of an information. Rule 7(e) provides:

> The court may permit an information to be amended at any time before verdict of finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Petitioner, who never waived the right to indictment, was put on trial for an offense different from that charged by the grand jury, and petitioner's substantial rights were manifestly prejudiced.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of ceritorari should be issued to review the decision of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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APPENDIX A
Opinion of the United States Court of Appeals for the Third Circuit

No. 79-2782

UNITED STATES OF AMERICA, *Appellee*

v.

PHILIP MILESTONE, *Appellant*

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* * * * * *

WEIS, *Circuit Judge.*

One count of a federal indictment charged bribery to affect the acts of two officials, but at pretrial, the prosecution elected to prove conduct only as to one. The trial court permitted an alteration of the indictment to that effect. We conclude that the modification did not constitute an amendment to the indictment requiring grand jury approval. Accordingly we reject the petitioner's contention to the contrary and affirm a district court judgment denying a writ of habeas corpus.

Petitioner sought postconviction relief under 28 U.S.C. §2255 from his conviction of bribery with intent to influence an official act in violation of 18 U.S.C. §201(b)(1), and aiding and abetting in violation of 18 U.S.C. §2. He alleged that the indictment had been improperly amended, that there was insufficient evidence of corruption, and that the government had failed to disclose exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). After an evidentiary hearing, the district court denied the petition.

Petitioner's conviction resulted from an indictment containing three substantive counts and one count of conspiracy for the bribery of two Internal Revenue agents. The incidents occurred during an audit of petitioner's returns for the years 1974 and 1975 by Internal Revenue agent Robert A. Mastrogiovanni and a simultaneous attempt by Revenue Officer Arnold R. Small to collect delinquent taxes for the years 1971 and 1972. A superseding indictment charged in Count 1 that petitioner, together with his accountant, hasd bribed Agent Mastrogiovanni. Count IV charged a conspiracy by petitioner and the accountant to bribe both officials. Counts II and III alleged that Officer Small had been bribed on two separate occasions to influence his decision and that of Agent Mastrogiovanni.

Defense counsel filed a motion to dismiss Counts II and III because they were duplicitous. After a pretrial argument, the government made an election on each of those counts. In Count II, the prosecution chose to assert that the bribe was given to Small to influence the decision of Mastrogiovanni. On Count III, the proof was to be that Small received the bribe to affect his own decision. To accomplish this result, the government moved to delete the language in Count II pertaining to the attempt to influence Small and in Count III the wording applicable to Mastrogiovanni.

In response to the government motion to remove these references, counsel for Milestone said: "Well, your Honor, that was my alternative request in my motion to dismiss to strike that language as surplusage; and your Honor, I have no objection to the Government making the election at this time." The court denied petitioner's motion to dismiss, but granted the government's motion for election.

At the conclusion of the trial, a redacted version of the indictment was sent out with the jury for its use in the course of its deliberation. The jury convicted the petitioner on Count III, but found him not guilty on the other counts. On direct appeal, the conviction was affirmed. *United*

States v. Milestone, 591 F.2d 1337 (3d. Cir.), *cert. denied,* ____U.S., ____48 U.S.L.W. 3218 (U.S. Oct. 1, 1979).

In this §2255 proceeding, petitioner alleges that the indictment was impermissibly amended, and, having failed to secure the assent of the grand jury to the change, the court lacked jurisdiction to convict the defendant. The petition also contends that the evidence was insufficient because Milestone had simply given money to the officer without an agreement of any kind. The third asserted ground for relief is that the government — but not the prosecutor personally — failed to disclose to the defense that Officer Small, who testified at trial, had been officially charged with various derelictions of duty by the Internal Revenue Service and was being processed for dismissal.

The petition was assigned to the same district judge who has presided over the trrial. After a hearing, he determined that the indictment had not been amended. He analogized the election to several situations, including one where an offense is charged conjunctively but either matter would constitute a violation. In that situation, the court reasoned, the government could present evidence as to either theory and the case could be submitted to the jury on that basis. Turning to the *Brady* claim, the trial judge found that neither the prosecutor nor the defense attorney was aware that official charges had been lodged against Officer Small by the agency at the time he testified. But since the government had informed the defense before trial about the preliminary stages of Small's difficulties with the Service and the defendant did cross-examine the officer about the matter, the court was convinced that there was no *Brady* violation. The court did not discuss the insufficiency claim.

Preliminarily, we find that the trial court did not err in the dismissal of the *Brady* claim, and we choose not to discuss it further. Similarly, there is no basis in the record to conclude that there was insufficient evidence to support the

conviction.[1]

The issue most vigorously pressed on this appeal is the alleged amendment of the indictment in violation of the principle set out in the opinion in *Ex parte Bain,* 121 U.S. 1 (1887). That venerable case stands for the proposition that after an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself. *See Stirone v. United States,* 361 U.S. 212, 215-217 (1960); *United States v. Goldstein,* 502 F.2d 526, 528-529 (3d Cir. 1974) (in banc). *Bain* discussed the unique function of the grand jury and the constitutional right to an indictment by that body. According to the Court, if the charge on which the defendant stood trial was not the complete product of the grand jury, then the trial court lacked power to try and sentence him. Since this was a matter of jurisdiction, it could be reviewed through a writ of habeas corpus.[2] Consistent with this view, it has been held that

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1. Although we seriously question whether the insufficiency of the evidence contention may be entertained in this § 2255 petition when there has been a direct appeal, *see* United States v. Williams, 615 F.2d 585, 590-91 (3d Cir. 1980); Battaglia v. United States, 428 F.2d 957, 960 (9th Cir.), *cert. denied,* 400 U.S. 919 (1970), we nevertheless conclude that the claim is without merit.

We note that present counsel did not represent petitioner either at trial or on direct appeal.

2. When *Bain* was decided (1887), there was no right of appeal in federal criminal cases. Review was secured through a writ of habeas corpus, and was available only to correct jurisdictionoal defects. The concept of jurisdiction as the necessary predicate for collateral review of criminal matters continued long after direct criminal appeals became available. Finally, in Waley v. Johnston, 316 U.S. 101 (1942), the Court abandoned the fiction that the writ was limited to jurisdictional deficiencies. *Id.* at 104-05; Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977). *See generally,* Hart, *Foreward: The Time Chart of the Justices,* 73 HARV. L. REV. 84, 103-05 (1959).

even if the defendant consented to an amendment, jurisdiction would not be conferred on the court, *see United States v. Norris,* 281 U.S. 619, 622-23 (1930); *United States v. Williams,* 412 F.2d 625, 627 (3d Cir. 1969), although this proposition is questionable today since Fed. R. Crim. P. 7(b) permits a defendant to waive an indictment altogether in noncapital cases.[3]

Rather than decide this appeal on a waiver basis, we prefer to go to the merits. That requires that we analyze *Ex parte Bain, supra,* a much quoted and much discussed decision. On first impression, that case appears to be controlling, but close examination reveals that it is distinguishable

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NOTE 2—Continued

This background suggests that *Bain's* characterization of the violation as jurisdictional may have been influenced by the Court's perception of a tightly restricted habeas corpus remedy. Whatever the reason, however, the jurisdictional categorization is precisely what permits review of this §2255 petition. For although petitioner did not raise this issue on direct appeal, collateral review is available under §2255 to correct jurisdictional errors. *See* Thor v. United States, 554 F.2d 759, 762 (5th Cir. 1977).

3. Acknowledging the "liberalizing effect" that Rule 7 has had on *Bain, see* United States v. Auerbach, 423 F.2d 767 (5th Cir. 1970) (per curiam), Professor Wright notes:

> "[T]here are occasional statements in the cases that an indictment cannot be amended even with the consent of the defendant. If taken literally these would be indefensible. . . . When the other great rights protected by the Constitution, such as right of counsel and right to trial by jury, are waivable by the defendant, it would be quite surprising if the right here in question could not be waived."

1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §127, at 271-72 (1969 & Supp. 1979) (footnote omitted).

on crucial factual grounds. There, the defendant was charged with a species of bank fraud, specifically, making a false statement "with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of the association . . . . " 121 U.S. at 4. The statute under which defendant was indicted, however, proscribed only false statements made with intent to deceive ' 'any officer of the association, or any agent appointed to examine the affairs of any such association." *Id.* at 3. A cornpanion statute, not the subject of the indictment, required that reports be submitted periodically by the association to the Comptroller.

In the trial court, defendant's demurrer to the indictment was sustained. Although the Supreme Court opinion does not explain the reason for the trial judge's ruling, apparently it was based on the premise that the statute made it an offense to deceive the agent appointed to examine bank affairs but did not extend the proscription to the Comptroller of the Currency. Thus, if the indictment required that the comptroller be deceived, no crime would be charged and the defendant's demurrer was proper.[4]

Following the favorable ruling to the defendant, however, "on motion of the United States, by counsel, the court order[ed] that the indictment be amended by striking out the words *'the Comptroller of the Currency and'* therein contained." *Id.* at 5, quoting the record of the trial court (emphasis from Supreme Court opinion). The indictment as modified then did charge a crime under the statute — deceiving the "agent." Thus, the defendant who was out of

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4. Apparently, the *Bain* trial court recognized the common law rule that although a statute may enumerate various acts in the disjunctive, the indictment should charge in the conjunctive. In such a case, the accused may be found guilty of either allegation. *See* 2 WHARTON'S CRIMINAL PROCEDURE §291 (12th ed. 1975).

court on his successful demurrer was brought back in by the action of the trial judge in modifying the indictment.

If the case had been submitted to a petit jury under the original indictment and a guilty verdict had been returned, it could not have been sustained because the court could not have known whether the jury believed that the comptroller had been deceived (no crime), or whether the agent had been misled (a crime under the statute). *Cf. Government of the Virgin Islands v. Richards* ____F.2d____, ____(3d Cir. 1980); *United States v. Dansker,* 537 F.2d 40, 51 (3d Cir. 1976), (if one of two alternatives in a count entirely negates guilt, then guilty verdict may not stand). That the Supreme Court applied a similar rationale to the indictment is brought out by Justice Miller's observation: "How can the court say that there may not have been more than one of the jurors who found this indictment, who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury?" 121 U.S. 10.[5] Obviously, then, the words deleted by the trial court were not mere surplusage but were of substance — striking them revived an indictment that had been moribund after the successful demurrer.

The *Bain* situation must be contrasted with the case at hand. In Count III, the indictment originally charged that Officer Small received a bribe with intent to affect his decision

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5. Later cases make it clear that this latter sentence is not to be read too literally — *e.g.*, surplusage may be deleted or ignored. *See* Ford v. United States, 273 U.S. 593, 602 (1927).

and that of Agent Mastrogiovanni.[6] Petitioner contends that just as in *Bain*, where the indictment required proof against both the Comptroller and the agent, so did the grand jury impose a similar dual burden upon the prosecution in the case at hand. Therefore, argues the petitioner, this case cannot be distinguished. Unlike *Bain*, however, both alternatives here describe criminal violations.

The pertinent statute, 18 U.S.C. §201(b)(1),. reads in relevant part: "Whoever . . . corruptly gives . . . anything

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6. Count III, as found in the first indictment, reads in pertinent part as follows:

> "That on or about November 16, 1977, at Philadelphia, in the Eastern District of Pennsylvania, PHILIP MILESTONE corruptly did, directly and indirectly, give a thing of value, that is, money in the amount of approximately two hundred dollars ($200.00) to Arnold R. Small. . . . a Revenue Officer of the Internal Revenue Service, with intent to influence the said Arnold R. Small's decision and action on a question and matter then pending before him in his official capacity . . . and with intent to influence the decision and action of Robert A. Mastrogiavanni [sic] . . . an Internal Revenue Agent, on a question and matter then pending before Robert A. Mastrogiavanni [sic] . . . in his official capacity. . . .
>
> In violation of Title 18, United States Code, Section 201(b)(1) and (2)."

The redacted Count III reads in pertinent part:

> "That on or about November 16, 1977, at Philadelphia, in the Eastern District of Pennsylvania, PHILIP MILESTONE corruptly did, directly and indirctly, give a thing of value, that is, money in the amount of approximately two hundred dollars ($200.00) to Arnold R. Small, . . . a Revenue Officer of the Internal Revenue Service, with intent to influence the said Arnold R. Small's decision and action on a question and matter then pending before him in his official capacity. . . .
>
> In violation of Title 18, United States Code, Section 201(b)(1) and 2."

of value to any public official . . . with intent — (1) to influence any official act . . . " shall be fined or imprisoned. By its terms, the statute focuses on giving to influence *any* official act, and whether the official act be one or many, one crime is committed by the one gift. If the government proved intent to affect the decision of Small, of Mastrogiovanni, or both, the statute would be violated, and the case could be submitted to the jury under any of those possibilities. The case, therfore, is not governed by *Bain* but is closer to *Salinger v. United States,* 272 U.S. 542 (1926), which allowed the trial court to withdraw part of a charge, and *Ford v. United States,* 273 U.S. 593 (1927), where the court was permitted to strike surplusage from an indictment without impairing its validity.

Properly viewed, *Bain* and its progeny forbid two general kinds of amendments to an indictment. First, *Bain* prohibits any amendment that transforms an indictment from one that does not state an offense into one that does. This is the fact pattern of *Bain* itself and it directly implicates the power of the court to try the defendant. The second improper alteration is seen in any change that tends to increase the defendant's burden at trial. This was the situation in *Stirone v. United States, supra,* and it is proscribed because it has the effect of undermining the notice function of the indictment. *See United States v. Crocker,* 568 F.2d 1049, 1059-60 (3d Cir. 1977); *United States v. Goldstein, supra* at 529.[7] But not every change has such prejudicial effect — some alterations are permitted.

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7. *Stirone,* a Hobbs Act prosecution, concerned an indictment that alleged as its interstate commerce clause nexus shipments of sand used to make concrete from outside Pennsylvania into that state. At trial, the government proffered an alternate basis for jurisdiction — the use of defendant's concrete in a mill that shipped steel products *from* Pennsylvania to other states. The Court held that this was an impermissible amendment.

The courts of appeals have given the *Bain* rule a similar, practical reading. In *Thomas v. United States,* 398 F.2d 531 (5th Cir. 1967), for example, the court sustained the action of the trial court in granting the government's motion to strike from an indictment one of the objects of a conspiracy and several overt acts charged. The defendant argued that these were allegations that the grand jury thought necessary to include in voting a true bill against him. The court held that *Salinger,* not *Bain,* controlled and noted that the effect of the court's action was to narrow, rather than expand, the issues the defendant was called upon to meet. The same observation applies to the case *sub judice. See also United States v. Hall,* 536 F.2d 313 (10th Cir.), *cert. denied,* 429 U.S. 919 (1976); *Overstreet v. United States,* 321 F.2d 459 (5th Cir. 1963), *cert. denied,* 376 U.S. 919 (1964).[8]

NOTE 7—Continued

Interestingly, the *Stirone* explanation of *Bain, see* 361 U.S. at 216 n.2, fails to capture the essence of the latter's holding. *Stirone* failed to mention the crucial fact that only under one alternative was Bain charged with an offense.

8. Defendant also argues that submission of a copy of the redacted indictment to the jury was error. This contention is without merit. *See* United States v. McCrane, 527 F.2d 906, 912-13 (3d Cir. 1975), *vacated on other grounds,* 427 U.S. 909, *aff'd on remand,* 547 F.2d 204 (3d Cir. 1976) (per curiam).

Finally, we note that it is irrelevant whether the trial court was correct in holding that the counts were duplicitous since any error in that respect favored the defendant. Duplicity is the joining in a single count of two or more distinct and separate offenses. United States v. Starks, 515 F.2d 112, 116 (3d Cir. 1975). But deciding that there are separate offenses must be supported by a finding of legislative intent to provide multiple punishment for the same conduct. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §142 (1969). We question whether multiple punishment could be imposed for the same $200 bribe simply

We conclude, therefore, that deleting the reference to Agent Mastrogiovanni in Count III was not an amendment to the indictment and was, at the most, only the removal of surplusage on the motion of the defendant. *See* Fed. R. Crim. P. 7(d).[9] It follows that the modification of the indictment did not require the resubmission to the grand jury, and the district court did not lose jurisdiction over the case. Accordingly, the district court properly dismissed the petition for habeas corpus. The judgment will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

NOTE 8—Continued

because the decision of more than one official was to be affected. *Cf.* Busic v. United States, ____U.S.____, 48 U.S.L.W. 4535 (U.S. May 19, 1980); Simpson v. United States, 435 U.S. 6 (1978) (interpretation of federal enhancement statute prohibiting use of a firearm in the course of a felonious act). Insofar as Count III was concerned, only one bribe was given on one occasion.

9. Rule 7(d) reads:

"The court on motion of the defendant may strike surplusage from the indictment or information."

APPENDIX B
Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2782

UNITED STATES OF AMERICA

vs.

MILLESTONE, PHILLIP
3385 Pine Road
Huntington Valley, PA.

Philip Milestone,

Appellant

(D.C. Criminal No. 77-00512-02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, WEIS and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 21, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 30, 1979, be, and the same is

hereby affirmed. Costs taxed against appellant.

ATTEST:
[s] Thomas F. Quinn
Clerk

June 30, 1980

* * *

APPENDIX C
Oral Opinion of District Court

* * *

There are two issues that are raised. The first is a contention that the matters, as submitted to the jury, in some manner amended the indictment that had been presented by the Grand Jury.

The defendant was convicted only as to Count III, which is a violation of Title 18, U.S. Code Section 201B, 1 and 2, and charges that on November 16, 1977, a sum of money, approximately two hundred dollars was given to Arnold Small, and the count then further proceeds to say that it was given with intent to influence Arnold Small's decision concerning taxes owed by the defendant, and with intent to influence the decision of Robert Mastrogiovanni, an employee of the Internal Revenue Service.

I'm not sure at this point, because we do not have the records from the Court of Appeals, exactly how the issue came up pretrial, but I believe it was by reason of various pretrial motions that were filed on behalf of the defendant in which the question of Count III was brought up as to whether or not it was duplistic, and therefore should be dismissed; and I am not sure whether there was a direction by myself, or whether it was simply a suggestion that the Government should elect, as to whether they were proceeding under one or the other, or possibly both. I am not sure.

It is clear, under the law, that if, in fact, money was paid for the purpose of influencing Arnold Small, it would have been a violation; and if it was paid for the purpose of influencing Robert Mastrogiovanni, it would have been a violation; or if it was paid for the purpose of influencing both of them, it would have been a violation.

There was no evidence presented, that I recall, in the course of the trial, from which the jury could have found

that that payment was done with, for the purpose of influencing the decision of Robert Mastrogiovanni, although I may be in error in that.

In any event, the Government elected to proceed on the theory that, and solely on the theory that money was paid for the purpose of influencing a decision by Arnold Small.

It was submitted to the jury on that theory.

A copy of the indictment, or relevant portions of the indictment was sent out to the jury to assist it in understanding the nature of the charges against the defendant.

The fact that it was not the original indictment, or the entire indictment, it seems to me, does not raise any issues, so long as there was, so long as the matter, as it was submitted to the jury, was a matter that included the charges that had been presented by the Grand Jury.

It seems to me that this is analogous to the situation, where there is a count in which something is charged conjunctively, but one or the other would constitute the offense; and the Government presents evidence only as to the one, and it is submitted to the jury on the basis of only the finding of the one.

It is also analogous to a situation, as I see it, where a conspiracy charges many overt acts, and there is no evidence as to certain overt acts that were found by the indictment; and it certainly would, I think the cases hold as a matter of fact, it will be proper under those circumstances to submit a copy of the indictment to the jury, to the trial jury, with those overt acts as to which there would be insufficient evidence contained in it, or at least without explaining to the jury they could not base their finding on such an overt act.

It's also, I think, somewhat analogous to a situation, although not completely so, of where there may be multiple counts in an indictment, but as to some counts they're dismissed by the court, or the Government agrees to drop them before the matter is submitted to the jury; and a copy

of the indictment, without those particular counts, is sent to the jury for its investigation and inspection.

I think it's also of significance in this case that there was no objection expressed by defense counsel, so far as I recall, to the election that had been made by the Government, to the form of the copy of the indictment that was submitted to the trial jury for its consideration; and as I understand the contention of the defendant in this case, that is the petitioner, what counsel took would be immaterial since it is a constitutional issue, and apparently one which defense counsel assumes could not be waived by counsel for the petitioner.

Be that as it may, and whether it's relevant or not, it is, I think, a matter of record, that there was no objection at that time, and it seems to me that should make some difference.

* * *

Therefore, the petition for writ of habeas corpus, or for dismissal under 28 U.S.C., Section 2255 filed by Mr. Milestone will be denied and dismissed.